Appl. No. : **09/890,366**
Filed : **July 26, 2001**

REMARKS

The following remarks are supplemental to the remarks contained in the amendment filed February 23, 2005 and in the supplemental response filed February 24, 2005 in response to the Office Action dated November 23, 2004. The entire contents of the amendment filed February 23, 2005 and the supplemental response filed February 24, 2005, are incorporated herein by reference. Thus, Applicants submit that it is not necessary to restate the status of the claims. However, for completeness, Claims 1 and 9-16 remain pending in the present application.

The Outstanding Notice of Nonresponsiveness dated April 1, 2005 indicates that the amendment filed February 28, 2005 is not fully responsive "because it fails to include a complete or accurate record of the substance of the interview on or around 18 November 2004 with Steve Griffin." Applicants submit that because the interview between the undersigned and Examiner Steve Griffin did not touch on the "merits" of the application, no such summary is necessary.

Applicants submit that it has long been established that:

> A complete written statement as to the substance of any face-to-face, video conference, electronic mail or telephone interview with regard to the ***merits*** of an application must be made of record in the application, whether or not an agreement with the Examiner was reached at the interview.

M.P.E.P. § 713.04 (emphasis added).

In any event, Applicants hereby submit the following written statement as to the substance of the discussion between the undersigned and Steve Griffin in order to avoid any further controversy with the Examiner:

Written Statement of Substance of Telephonic Interview on or about November 18, 2004

On or around November 18, 2004, the undersigned spoke with Examiner Steve Griffin (Examiner Hoffmann's Supervisor) telephonically regarding a procedure taken by Examiner John Hoffmann in the present application. In particular, the undersigned contacted Steve Griffin to discuss Examiner Hoffmann's refusal to enter the amendment filed October 22, 2004. As set forth in the Office Action dated November 1, 2004, the Examiner refused to enter Applicants' amendment filed October 22, 2004 because Claims 9-11 were labeled as "new" where they should have been labeled as "previously presented." The M.P.E.P. makes clear that where such

errors are made, the Examiner is to issue a Notice of Nonresponsiveness and allow Applicants to correct the error.

Instead of following the rules set forth at M.P.E.P. § 714.03, Examiner Hoffmann decided to completely refuse entry of the amendment dated October 22, 2004 and submit a new Office Action dated November 1, 2004.

As set forth at page 2 of the November 1st Office Action, the Examiner submitted this new Office Action to correct an error in the Office Action dated October 8, 2004. Applicants' counsel explained to Steven Griffin that Examiner Hoffmann's refusal to enter Applicants' October 22nd amendment and decision to issue a new Office Action was not proper under Patent Office rules. Rather, Examiner Hoffmann had avoided entering and considering Applicants' October 22nd amendment because this amendment pointed out that the October 1, 2004 Office Action was flawed to the extent that the finality of that Office Action must be withdrawn.

Examiner Griffin agreed that such an action was improper and apologized for Examiner Hoffmann's conduct. Additionally, Examiner Griffin agreed to discuss this case with Examiner Hoffmann.

For completeness, and full satisfaction of M.P.E.P. § 713.04, Applicants also submit that:

(A) No exhibits were shown.

(B) No claims were discussed, except for the status indicators used on Claims 9-11.

(C) No prior art was discussed.

(D) No amendments were discussed, except for the correction of the status indicators of Claims 9-11.

(E) The thrust of the interview, which did not include arguments regarding substantive patentability issues, is set forth above.

(F) No other pertinent matters were discussed.

(G) The result of this interview, as noted above, was that Examiner Griffin agreed to speak to Examiner Hoffmann. Further, as is evident from the record, Examiner Hoffmann decided to withdraw all of the previous Office Actions in the present application as a result of his discussion with Examiner Griffin.

As is clear from the above explanation, the "merits" of the present Application were not discussed during the interview of November 18, 2004. Rather, the discussion between the

undersigned and Examiner Griffin was essentially a complaint about Examiner Hoffmann's performance as a Patent Office employee. Thus, Applicants submit that the present explanation of the substance of the November 18th interview is not necessary and that the Notice of Nonresponsiveness dated April 1, 2005 should be withdrawn.

Finally, Applicants submit that the present supplemental response should be entered. Applicants submit that it is long been established that "generally, a second (or subsequent) supplemental reply (i.e., the third (or subsequent) reply) will be entered unless it unduly interferes with an Office Action being prepared in response to a previous reply." M.P.E.P. § 714.03(a)II. In the present Application, the Examiner has specifically requested a further supplemental response by way of the outstanding Notice of Nonresponsiveness dated April 1, 2005. Thus, the present supplemental response cannot be refused entry based on an undue interference with the preparation of an Office Action.

CONCLUSION

In view of the foregoing, as well as the amendment filed February 23, 2005 and the supplemental response filed February 24, 2005, Applicants submit that the present application is believed to be in condition for allowance, and such allowance is respectfully requested. If further issues remain to be resolved, Applicants' undersigned attorney of record hereby formally request a telephone interview with the Examiner. Applicants respectfully request the Examiner to call the undersigned attorney of record at (949) 721-6384 (direct line) or the general office listed below.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: 4/22/05

By: _____

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